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IN THE

Supreme Court of the United States

OCTOBER TERM—1946.

No. 482

WATERMAN STEAMSHIP CORPORATION,

Petitioner,

versus

U. S. SMELTING, REFINING & MINING CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

and

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HARRY F. STILES, JR.,
JAMES J. MORRISON,
Proctors for Petitioner.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit entered on May 24, 1946, rehearing denied June 18, 1946, affirming the decree of the District Court of the United States for the Eastern District of Louisiana entered on September 20, 1945, which Court denied a rehearing on October 24, 1945.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, filed on May 24, 1946, is re-

ported in 155 Fed. (2d) 687 (Advance Sheet August 5, 1946), 1946 AMC 997 (June Advance Sheets). Petition for rehearing was denied on June 18, 1946, without opinion.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 347.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed and the decree of said Court entered on May 24, 1946; petition for rehearing was filed June 7, 1946 and denied, without opinion, on June 18, 1946.

QUESTIONS PRESENTED.

The fundamental question presented in this petition is whether, under the language of the covering bill of lading, the rights and liabilities of petitioner, as a common carrier of goods by sea, are governed by the provisions of the Carriage of Goods by Sea Act or by the jurisprudence of the courts of the United States dealing with loss of deck cargo.

The pertinent clauses of the covering bill of lading[1] provide as follows:

> Section 1. "* * * The terms 'Owner's Risk' and 'O. R.' mean that carrier shall not be liable

[1] R. 8, 15.

for loss or damage unless shown to have resulted from some negligence or default of carrier against liability for which it is precluded by law from contracting."

Section 3. "This bill of lading shall be deemed to incorporate and shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, and nothing herein contained shall be deemed a surrender by Carrier of any of its rights or immunities or an increase of any of the responsibilities or liabilities thereunder; nor shall Carrier be deemed to have warranted the seaworthiness of the Vessel. The provisions stated in said Act shall (except as may be otherwise provided herein) govern before the Goods are loaded on and after they are discharged from the ship and throughout the entire time that they are in the custody of the Carrier. In respect of Goods carried on deck and stated herein to be so carried, all risks of loss or damage by perils incident to such carriage shall be borne by Cargo Owner but in all other respects the custody and carriage of such Goods shall be governed by the terms of this bill of lading and except as otherwise herein provided, by the provisions stated in said Carriage of Goods by Sea Act notwithstanding Section 1 (c) thereof. Carrier shall also have the benefit of Sections 181 to 189 inclusive, of Title 46, U. S. Code, and of all other statutes of the United States or any other country which may be applicable in the circumstances to grant Carrier exemption from or limitation of liability.

"Provided further, that if this bill of lading be issued for goods shipped from any port or place in Canada it shall have effect subject to the provisions of the rules relating to bills of lading contained in and as applied by the Canadian Water Carriage of Goods Act, 1936."

Section 22. "* * * Live animals and Goods carried on deck shall be at Owner's risk."

SUMMARY STATEMENT.

An *in personam* action was brought in admiralty by U. S. Smelting, Refining & Mining Co., as owner of the cargo lost, against Waterman Steamhip Corporation, as owner of the carrying vessel.

Libelant's entire shipment, consisting of 698 pieces of prefabricated structural steel, was loaded aboard the Steamship WEST KYSKA at Baltimore, Maryland, and was destined for Nome, Alaska, but the undertaking of petitioner was to carry it only as far as Seattle, Washington, where it was to be transshipped to a vessel of another ocean carrier. Of the shipment, 771 tons were loaded on deck and this was so stated on the face of the covering bill of lading.

The Steamship WEST KYSKA sailed from Baltimore, Maryland, on March 25, 1941. After calling at various ports of the United States and while enroute from Oakland, California, to Seattle, Washington, she ran into a heavy cross sea which caused her to roll and labor heavily.

At 8:37 a. m., on May 3, 1941, the vessel, as a result of having been struck on her port beam by an exceptionally large wave, gave a sharp and violent twist. The lashings of her #1 port deck stow came adrift and a portion of the stow went into the sea.

The libel was filed to recover the value of 13 pieces of steel thus lost.

Petitioner contended that, because the loss was of deck cargo, its rights and liabilities were governed by the decisions of our courts relating to carriage of goods on deck and that, therefore, it could not be held liable unless the cargo owner proved by a fair preponderance of evidence that the loss was caused by petitioner's negligence in the stowage and custody of the cargo. The District Court, in rendering a decree in favor of libellant, held that petitioner negligently failed to comply with the obligation imposed on a carrier under the provisions of Section 3 (2) of the Carriage of Goods by Sea Act.[2]

Petitioner appealed to the U. S. Circuit Court of Appeals for the Fifth Circuit and that Court held that the duties and liabilities of petitioner were governed, under the language of the covering bill of lading, by the Carriage of Goods by Sea Act. The Court did not decide the question of whether or not petitioner was negligent in the stowage and custody of the deck cargo[3] but, on the contrary, held that the burden was on petitioner to show that the loss occurred because of a reason for which it would be excused under the Carriage of Goods by Sea Act.[4]

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[2] 62 F. S. 511, 519, 1945 AMC 1215, 1229.
[3] 155 F. (2d) 687, 693, 1946 AMC 997, 1006.
[4] 155 F. (2d) 687, 691, 1946 AMC 997, 1003.

THE REASON FOR GRANTING THE PETITION.

The Circuit Court of Appeals for the Fifth Circuit has interpreted the language of Section 3 of the bill of lading to mean that the cargo owner and the ocean carrier contracted that their respective rights and liabilities as to deck cargo were to be governed by the provisions of the Carriage of Goods by Sea Act. The effect of this decision is that where deck cargo is carried under a bill of lading containing the language heretofore set out, the carrier is deprived of those rights and defenses to which he has been entitled since the inception of the maritime law of our nation.

The pertinent language in Section 3 is, for all practical purposes, the same language which is incorporated in the uniform North Atlantic Bill of Lading which was approved and put into general use by the Associated North Atlantic Freight Conferences on September 1, 1937.[5]

It is believed that practically all of the American steamship companies use language similar or nearly similar to the language used in the covering bill of lading under consideration here.

It is of importance to American ship owners and their insurers that the measure of an ocean carrier's liability

[5] Knauth, Ocean Bills of Lading, 1941, pages 81, 85. The language of the uniform North Atlantic bill of lading 1937 reads as follows, page 85: "In respect of goods carried on deck and stated herein to be so carried, all risks of loss or damage by perils inherent in such carriage shall be borne by the consignee but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Sec. 1(C) thereof."

under this bill of lading language be settled by this Court. A revitalized and vigorous American Merchant Marine in the hands of private carriers, following the extraordinary expansion of our merchant shipping during the recent war, requires that this matter be set at rest by highest authority.

If the duties and liabilities of an ocean carrier in respect to deck cargo are to be governed by the provisions of the Carriage of Goods by Sea Act, under the above quoted bill of lading language, then it is obvious that those duties and liabilities have been increased measurably over such duties and liabilities as previously defined by this Court and other courts of the United States.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

HARRY F. STILES, JR.,
JAMES J. MORRISON,

.....

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Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

THE QUESTION OF LAW PRESENTED.

The question presented for the court's consideration is whether, under the covering bill of lading, the deck cargo of the WEST KYSKA was being carried subject to the provisions of the Carriage of Goods by Sea Act.[1]

The Act does not, by its own terms, apply to deck cargo.[2] Therefore, it can only apply if it has been made to do so by the contract of carriage.

Other than the holdings of the District Court and Circuit Court of Appeals for the Fifth Circuit in the instant case,

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[1] Act of April 16, 1936, c. 229, 49 Stat. 1207, 46 U. S. C. 1300.
[2] Act of April 16, 1936, Sec. 1, 49 Stat. 1208, 46 U. S. C. 1301 (c).

it is believed that there are no decisions interpreting the language contained in Section 3 of the bill of lading.

It is submitted that the language there contained not only does not make deck cargo carried under it subject to the Carriage of Goods by Sea Act, but under the circumstances of the instant loss, specifically provides that the Carriage of Goods by Sea Act shall not apply.

The clause provides that as to goods carried on deck, where it is stated in the bill of lading that they are to be so carried, all risks of loss or damage by perils incident to such carriage shall be borne by the cargo owner. Here, there is no dispute as to the facts (1) that the goods were carried on deck and (2) that the bill of lading so stated.

It is believed, also, that there cannot be any doubt as to the fact that the loss was sustained because of a peril incident to on-deck carriage. The chain lashings securing the No. 1 deck stow came adrift and part of this stow, i. e., 13 plates, slipped over the rail of the vessel.

Had the plates been stowed below decks, it is obvious that even though the lashings had come adrift, the plates would not have gone into the sea. To put it another way, the plates could not have gone overboard had they been stowed below decks and the fact that they did go overboard and were lost demonstrates conclusively that their loss was occasioned by a peril incident of deck carriage.

Therefore, the rights and liabilities of the parties are governed by the agreement between the shipper and the

carrier that these goods, carried on deck, were carried at owner's risk.

Under such an agreement, the only duty which the carrier owed the shipper was to properly stow the cargo, and the burden of showing that the deck cargo was either improperly stowed or inadequately secured is on the shipper.

In order for the interpretation of the bill of lading by the Circuit Court of Appeals for the Fifth Circuit to be justified, it is necessary to read out of the clause above quoted, the two phrases "but in all other respects" and "except as otherwise herein provided".

Apparently, the Court of Appeals for the Fifth Circuit has not taken these two phrases into consideration in arriving at the meaning of the clause, and it is contended that the language referred to is vital in order to correctly determine the meaning.

In addition to the language contained in Section 3 of the bill of lading, Section 1 provided, in part, as follows:

> "* * * The terms 'Owner's Risk' and 'O. R.' mean that carrier shall not be liable for loss or damage unless shown to have resulted from some negligence or default of carrier against liability for which it is precluded by law from contracting."

And Section 22 provided, in part, as follows:

> "* * * Goods carried on deck shall be at Owner's risk."

It is difficult to conceive how a contract could have been more explicit in fixing the rights and liabilities of the parties as to on-deck carriage.

If nothing had been stated in the bill of lading as to the terms under which deck cargo was carried, it is quite clear from the jurisprudence that the only obligation which the carrier owed the owner of the goods was to properly stow and adequately secure the deck cargo. It seems unreasonable to suppose that the carrier voluntarily took upon itself, by contract, a greater responsibility than that provided by law in the absence of contract.

THE EFFECT OF THE APPLICATION OF THE CARRIAGE OF GOODS BY SEA ACT TO DECK CARGO.

Should the Carriage of Goods by Sea Act be held to apply to deck cargo under the language of Section 3 of the bill of lading then the burden is upon the carrier to show that the loss or damage was due to a cause for which he may not be held liable under the Act and the carrier also has the risk of non-persuasion.[3]

On the contrary, if the Carriage of Goods by Sea Act be held not to apply, then the liability of the carrier for loss or damage to deck cargo is limited to those cases where the carrier is negligent in either the stowage or

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[3] Waterman Steamship Corporation v. U. S. Smelting, Refining & Mining Co.; Wigmore on Evidence, (3rd Ed.) Sec. 2508; Commercial Molasses Corp. v. N. Y. Tank Barge Corp., 314 U. S. 104, 109, 62 S. Ct. 156, 86 L. ed. 89 (1941); The Edwin I. Morrison, 153 U. S. 199, 212, 14 S. Ct. 823, 38 L. ed. 688 (1894).

custody of the cargo and the burden of proving such negligence is on the owner of the goods.

The distinction between the liability of an ocean carrier as to underdeck cargo and his liability as to deck cargo even in the absence of contractual exemption from liability, was recognized in this country as early as 1803, in the case of *Smith and Stanley v. J. and I. Wright.*[4] The testimony was reviewed in the following language:

> "Several eminent brokers, underwriters, and merchants were examined, and they all uniformly testified that goods on deck, if lost, are paid for by the underwriters on those goods, without contribution from the assurers of the vessel or other parts of the cargo; that there was no instance of an average or contribution allowed, when a loss happened in this way; that they never knew of any such case occurring between an owner of goods on deck and the owner of the vessel; that goods on deck always pay a higher premium, even in summer double, in winter, about 7 to 3, and less freight than goods under deck; the freight is less by one half, or two thirds, or thereabouts, but always less; that they never before heard of a demand of this kind made against the owner of a vessel by the shipper of goods; that the freight of goods on deck is less than when below, because they are not considered as at the risk of the owner of the vessel."

In holding for the vessel owner, the court said:

> "It is sufficient for our purpose that the usage has been against the allowance of average to goods placed on the deck of a vessel."

[4] 1 Caines 43 (N. Y.—1803).

In 1836, in the case of *The Paragon*[5] the court said:

> "And it may also be admitted to be proved that if the shipper consents to his goods being carried on deck, the master will not be liable for any loss or damage that is occasioned by the dangers of the seas. But this is no more than follows from the general principles of law, independent of any special custom. *Modus et convention vincunt regulam.* In any case, if the owner consents to his goods being carried on deck, the master will be exempted from his responsibility."

This court, in the celebrated case of *Lawrence v. Minturn*,[6] decided in 1855, declared:

> "But the maritime codes and writers have recognized the distinction between cargo placed on deck, with the consent of the shipper, and cargo under deck.
>
> "There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of its owner; and they afford very high evidence of the general and appropriate usages, in this particular, of merchants and ship owners. Consolato, par Pardessus, ch. 186; Ord. de Mar. Valin, lib. 2, tit. 1, art. 12; Code du Com. Mar. par Locre, art. 229, lib. 2, tit. 4, art. 229; Emerigon, ch. 12, sec. 42; Boulay Paty, tom. 4, 566, 568."

While the three cases above cited involved jettisoning of deck cargo, it is nevertheless indicated from the lan-

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[5] 1 Ware 326, Fed. Cas. 10,708 (DC Me.-1836).
[6] 58 U. S. (17 How.) 100, 15 L. Ed. 58 (1855).

guage of the decisions that there could be no recovery by the cargo owner for loss of or damage to deck cargo no matter how caused.[7]

This principle was modified by later decisions holding that the vessel owner could not escape liability where the loss of deck cargo was due to faulty stowage, which rendered the vessel unseaworthy[8] or resulted in the stow itself being improperly secured.[9]

However, the burden of showing negligence in stowage of deck cargo was placed squarely on the owner of the goods. In the case of *The Taibu Maru,*[10] the court held:

> "It is to be observed that the libellant's brief asserts that an 'on deck at shipper's risk' bill of lading requires the claimant to use the care that an ordinarily prudent shipowner would exercise,

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[7] To the same effect: Wellington, 1 Biss. 279, 2 West L. Mthly. 523, Fed. Cas. 17,384 (DC Wis.-1859); Higgins v. Watson, 43 Hunt Mer. Mag. 69, Fed. Cas. 6470 (DC NY-1860); Talbot v. Wakeman, 25 Betts, DC MS 152, 19 How. Prac. 36, Fed. Cas. 13,731 (DC NY-1860); Milwaukee Belle, 2 Biss. 197, 9 ALR (ns) 311, 3 ALT Rep. US Cts. 65, 2 Chi. Leg. N. 50, 17 Pittsb. Leg. J. 148, Fed. Cas. 9,627 (DC Wis.-1869); See also The Thomas P. Thorn, 8 Ben. 3, Fed. Cas. 13,927 (DC NY-1857), where the Court said: "The question . . . is whether upon a contract to carry on deck, this vessel is liable for the wetting of this tobacco. It is manifest that the injury to the tobacco arose simply from the fact that it was carried on deck. . . . But, under a contract to carry upon deck, the risk of any damage resulting from the place of carriage rests upon the shipper . . . and, without proof of negligence causing the damage, there can be no recovery."

[8] Olsen v. United States Shipping Co., 213 Fed. 18 (CCA 2-1914); Royal Sceptre, 187 Fed. 224 (SD NY-1911); Barker v. The Swallow, 44 Fed. 771 (ND Ill.-1890); Colima, 82 Fed. 665 (SD NY-1897); Fleishman v. The John P. Best, 37 Leg. Int. 18, 8 Wkly. Notes Cas. 30, 14 Phila. 527, Fed. Cas. 4861 (ED Pa.-1879).

[9] U. S. Industrial Alcohol Co. v. Calmar S. S. Corp., 53 F. 2d 1023, 1931 AMC 1737 (SD NY-1931); rev'd on other grds., 57 F. (2d) 182, 1932 AMC 526 (CCA 2-1932); cert. den. 287 U. S. 622, 53 S. Ct. 21, 77 L. ed. 540, 1932 AMC 1484; Carlos, 237 Fed. 731 (ND Cal.-1916); Talbot v. Wakeman, 25 Betts, D. C. Ms. 152, 19 How. Prac. 36, Fed. Cas. 13,731 (SD NY-1860).

[10] 1930 A. M. C. 1065 (ED NY-1930).

and that the libellant must establish negligence affirmatively, as in the case of a bailment. This seems to be the basis of the decision in the case of Lawrence v. Minturn, 58 U. S. 100, at 115.

"The rule which will guide this decision is that, in an action by a bailor against a bailee, after the bailor has proved the loss, the burden of showing how the loss occurred is cast upon the bailee; when the bailee has shown these facts, the bailor has the burden of showing, by a fair preponderance of evidence, that the loss occurred by reason of the negligence of the bailee."

* * * * * * *

"The respondent having established the facts as to the loss of this portion of the deck cargo, it became the burden of the libellant to show, by fair preponderance of evidence, that the loss occurred by reason of the negligence of the claimant."

THE IMPORTANCE OF THE QUESTION PRESENTED.

As stated in the foregoing petition, the language in Section 3 of the bill of lading under consideration here is identical or similar to language used in the bills of lading of all American shipowners and a final decision on the question here presented is of vital consequence not only to shipowners but to cargo owners and insurers of both.

As pointed out over a hundred years ago in the case of *Smith and Stanley v. J. and I. Wright, supra,* and com-

paratively recently in the case of *The Carriso*,[11] deck cargo is carried at greatly reduced freight rates and on the other hand requires much larger insurance premiums. If the liability of a vessel owner as to deck cargo under the bill of lading here considered is to be the same as his liability for under deck cargo, then it would seem to follow that he must either alter the clause to eliminate any reference to the Carriage of Goods by Sea Act or adjust his rates upward for deck cargo.

Also, it is quite apparent that under the decision sought to be reviewed the insurer of the shipowner is exposed to a greater hazard in connection with losses occurring to deck cargoes.

Conversely, where the instant form of bill of lading is used, the position of the owner of cargo laden on deck and his insurer has been substantially improved.

There can be no doubt of the far reaching consequences of the decision sought to be reviewed.

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[11] The Carriso, 30 F. (2d) 279, 280, 1929 A. M. C. 213 (CCA 9-1929); cert. den. 279 U. S. 853, 49 S. Ct. 348, 73 L. ed. 996 (1929).

CONCLUSION.

Petitioner believes that, the record will show that the cargo owner has failed to sustain the burden of proving that the loss in suit was caused by the negligence of petitioner in failing to properly stow and adequately secure the deck cargo.

In view of the importance of the subject matter to American shipping interests and in view of what petitioner conceives to be manifest error in the decree below, it is urged that the writ prayed for herein should be granted.

Respectfully submitted,

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

Some clarification of the facts seems necessary to a right understanding of the case.

In March, 1941 a shipment of 1052 tons of structural steel, consisting of 1469 pieces, was delivered to petitioner, a common carrier, at Baltimore, for carriage on its vessel, the "West Kyska," to Seattle. Petitioner stowed 771 tons thereof on deck under a bill of lading providing for on deck stowage and the remainder was stowed under deck. During the course of the voyage, thirteen large steel plates stowed on deck, slid overboard.

The Master of the "West Kyska" testified that the loss occurred at a time when two hooks, which secured the chain lashings of that portion of the steel which was stowed on the port side of No. 1 hatch, became bent in such fashion as to release the lashings, resulting in the loose steel at the top of the pile sliding into the sea (R., p. 137). The Master testified further that the weather at the time of the loss was only such as one would expect in that season (R., pp. 158-159).

The Master did not testify that his vessel was struck by "an exceptionally large wave," as is asserted by petitioner (Petition, p. 5). On the contrary, the Master testified that respondent's cargo was lost when the ship gave "a very severe roll" during a "heavy westerly swell" with a wind force of 3 on the Beaufort Scale (R., p. 136). He testified further that at the time of the alleged "severe roll" the swell was not of sufficient size or force to cause water to reach the deck (R., p. 161). This is quite understandable when it is observed that the Beaufort Scale (Ex. 19, R., p. 103) characterizes force 3 as a gentle breeze with a wind velocity of only 8 to 12 miles an hour.

The District Court found that the deck stow, of which the thirteen plates were a part, was improperly made and inadequately secured by petitioner; that no peril of the sea, nor peril incident to on deck stowage was present, the sole proximate cause of the loss being faulty and insecure stowage (R., p. 208).

The District Court denied petitioner's application for a rehearing.

The Circuit Court of Appeals affirmed the decree of the District Court holding that the evidence did not establish the existence of a "peril of the sea" (R., pp. 236-237) and that "the record discloses no evidence on the subject of a latent defect" in the hooks which gave way (R., p. 234).

The Circuit Court of Appeals similarly denied petitioner's application for a rehearing.

Petitioner's answer to the libel pleads but two special defenses in relation to the issue of liability, viz., "peril of the sea" and "latent defect" (R., p. 45). As the Circuit Court of Appeals held that neither was established, this is tantamount to a holding that respondent's goods were lost by reason of petitioner's negligence: obviously, if neither a sea peril nor latent defect in the metal hooks caused the lashings to give way, the loss could have resulted only from negligent stowage.

This is in accord with the long settled rule of the law of bailments that where chattels are delivered to a bailee in good condition and are returned in a damaged state, or are not returned at all, the law presumes negligence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part (6 Corpus Juris, p. 1158; *The John Carroll,* 275 Fed. 302, 306 (C. C. A. 2).

Under this well recognized rule, it is clear that if no sea peril or latent defect is shown, there is no ground upon which petitioner can escape liability.

The District Court and Circuit Court of Appeals, having found that the evidence failed to establish the existence of either defense, it is submitted that the concurrent findings of the lower Court should be accepted by this Court.

The Question Presented

At page 2 of the petition, it is stated that the fundamental question presented is whether, under the language of the bill of lading, the rights and liabilities of petitioner, as a common carrier of goods by sea, are governed by the provisions of the Carriage of Goods by Sea Act.

At the outset, we invite the Court's attention to paragraph VI of petitioner's amended answer to the libel, filed on the date of trial (R., p. 46), which pleads the provisions of the Carriage of Goods by Sea Act and alleges that under

Section 4 of the Act it is relieved of responsibility for loss resulting from perils of the sea and latent defect; and that as the loss of respondent's deck cargo had occurred by reason of either of those causes, there is no liability upon petitioner therefor.

Although it sought exoneration from liability under the Act, petitioner now makes application to this Court for a writ of certiorari stating that the question presented for consideration is

> "whether, under the covering bill of lading the deck cargo of the 'West Kyska' was being carried subject to the provisions of the Carriage of Goods by Sea Act" (Pet.'s Br., p. 1).

We shall not comment further upon petitioner's inconsistency in this regard but shall consider the contentions advanced in the petition.

At pages 4 and 5 of the brief, it is argued:

> (1) Should the Carriage of Goods by Sea Act be held to apply to deck cargo, the burden would then be upon the carrier to show that the loss was due to a cause for which no liability attaches under the act; but that if, however,
>
> (2) the Carriage of Goods by Sea Act be held not to apply then the liability of the carrier would be limited to those cases where the carrier is negligent in either the stowage or custody of the cargo, in which case, the burden of proving such negligence would be on the owner of the goods.

In the present respondent's brief in the Circuit Court of Appeals, it was argued—and we advance the same contention in this Court—that it is unnecessary to predicate petitioner's liability upon its failure to show that respondent's loss was due to a cause for which it is granted exemption under the Act, for the reason that, although under no legal requirement to do so, the cargo owner had adduced

proof clearly establishing that the loss of its cargo was the direct result of petitioner's negligent stowage (R., pp. 73-77, 83-84).

The Trial Court found:

> "The No. 1 hatch stow * * * was improperly made and inadequately secured."

and that

> "Such faulty and insecure condition of stowage was the sole proximate cause of the loss * * *" (R., p. 208).

If the burden of establishing negligence in stowage was that of the cargo owner (without regard to whether or not the ship had first shown the loss to fall within a peril of the sea, latent defect or other exemption under the Act)—we respectfully submit that the petition presents only an academic question for the consideration of this Court. The record herein clearly supports the Trial Court's finding that the cargo was lost by reason of petitioner's negligent stowage.

The Term "on Deck at Shipper's Risk" Does Not Afford Exoneration Where the Loss Is Due to the Carrier's Negligence

Before discussing the issue presented by petitioner's application, we wish to consider briefly the provision "on deck at shipper's risk." We deem such discussion particularly appropriate because of quotations from three cases, set out on pages 5 and 6 of petitioner's brief, which, it is asserted, hold that there can be no recovery by a cargo owner for loss of on deck cargo no matter how caused, although the petitioner, at page 7, makes the statement that that principle was modified by later decisions holding that a vessel owner cannot escape liability where the loss of the deck cargo was due to faulty stowage.

In *Compania La Flecha* v. *Brauer,* 168 U. S. 104, this Court said (pp. 123-124):

> "The words 'on deck at owner's risk' cannot have been intended by the parties to cover risks from all causes whatsoever, including negligent or wilful acts of the master and crew. To give so broad an interpretation to words of exception, inserted by the carrier and for his benefit, would be contrary to settled rules of construction * * *."

In the *Royal Sceptre,* 187 Fed. 224 (S. D. N. Y.), the Court said (p. 228):

> "The risk assumed presupposes proper loading for deck stowage * * *."

In *Pioneer Import Corporation* v. *The Lafcomo,* 138 F. (2d) 907 (C. C. A. 2), the Court said (p. 908):

> "The shipper accepted the risk of losses from carriage on deck only so far as they occurred under proper stowage."

The Circuit Court of Appeals for the Fifth Circuit Rightly Held the Petitioner Liable for the Loss of Respondent's Cargo

It is the petitioner's contention that while Section 3 of the bill of lading incorporates the Carriage of Goods by Sea Act, there is a qualifying provision that the Act governs "except as may otherwise be provided" therein. The "other" provisions in the bill of lading, which petition asserts the Circuit Court of Appeals failed to consider, are:

(1) "* * * In respect of Goods carried on deck and stated herein to be so carried, all risks of loss or damage by perils incident to such carriage shall be borne by cargo owner * * *" (Sec. 3).

(2) "* * * Goods carried on deck shall be at owner's risk" (Sec. 22).

(3) "* * * The terms 'Owner's Risk' and 'O. R.' mean that carrier shall not be liable for loss or damage unless shown to have resulted from some negligence or default of carrier against liability for which it is precluded by law from contracting" (Sec. 1).

As the loss of respondent's cargo was clearly not incident to deck stowage, but was, on the contrary, the result of petitioner's negligence, the Circuit Court of Appeals was, we submit, wholly justified in holding that the terms of the bill afford the carrier no defense.

Petitioner contends that the Circuit Court of Appeals erred in ruling that the burden was upon petitioner *initially* to establish that the loss fell within one or more of the exceptions against liability contained in the Carriage of Goods by Sea Act.

The bill of lading provision on which petitioner relies seeks to change a fundamental rule relating to the burden of proof in a cargo damage case. The refusal of the Circuit Court of Appeals to give effect to the provision finds support in numerous decisions of this Court, notably

Clark v. *Barnwell,* 12 Howard 272, 279;
Transportation Co. v. *Downer,* 11 Wall. 129, 133;
The Edwin I. Morrison, 153 U. S. 199, 212;
The Caledonia, 157 U. S. 124;
The Carib Prince, 170 U. S. 655;
The Folmina, 212 U. S. 354, 361;

and more recently in

Schnell v. *The Vallescura,* 293 U. S. 296, 304;
Commercial Molasses Corp. v. *N. Y. Barge Corp.,* 314 U. S. 104, 108-110.

The petitioner admitted that the thirteen pieces of structural steel were received on board its vessel at Baltimore and it further admitted that the steel was lost at sea (R.,

pp. 26, 31, 33). Consequently, under the decision of *Clark* v. *Barnwell*, *supra*, the burden of proof was on the petitioner to show that the loss was caused by some excepted peril.

This Court said in *The Folmina*, 212 U. S. 354, 361:

> "It was long since settled in Clark v. Barnwell, 12 How. 272, that where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition, and the goods are damaged on the voyage, in a proceeding to recover for the breach of the contract of affreightment, after the amount of damage has been established, the burden lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible."

In *Schnell* v. *The Vallescura*, 293 U. S. 296, this Court said (p. 304):

> "The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

Upon this point, in *Commercial Molasses Corp.* v. *New York Barge Corp.*, 314 U. S. 104, this Court said (p. 109):

> "For this reason, the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, whether imposed by statute or because he is a common carrier or because he has assumed it by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel. * * * And in

> that case, since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception."

In *The Folmima,* 212 U. S. 354, the Court said (p. 363):

> "As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt * * * must be resolved against the carrier. The Edwin I. Morrison, 153 U. S. 199, 212."

This case involves no principle which has not frequently been decided by this Court. Nor does the decision in any way depart from the well settled doctrine which has been established by numerous decisions of this Court, cited above. The Circuit Court of Appeals held that the petitioner had failed to sustain the burden of showing that the loss was due to an excepted cause. There is nothing novel in this decision.

The decisions of this Court, cited above, deal with under deck cargo losses which arose both prior and subsequent to the passage of the Harter Act (46 U. S. C., Secs. 190-195). The rule as to burden of proof, however, is in no wise different in an on deck cargo case.

The liability of a carrier for the loss of cargo shipped on deck at owner's risk was considered by this Court in *Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104. In that case the vessel owner was held liable for the loss of cattle jettisoned in rough weather because of an unfounded apprehension on the master's part of the existence of a peril to this ship. It was claimed by the vessel owner that the storm encountered by the vessel "was one of notable severity and the losses of the cattle were due to the perils incident to the storm" (p. 111). The contention was rejected by this Court. The loss was held to have re-

sulted from the vessel owner's negligence in the custody of the cargo and the libellant prevailed, notwithstanding the bill of lading clause "on deck at shipper's risk."

This Court stated at page 124:

> "The wrongful jettison of the sound cattle by the act of the carrier's servants cannot reasonably, or consistently with the line of English authorities already cited, or with our own decisions, be considered either as an 'accident to, or mortality of the animals,' or as a 'loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters,' or yet as a loss or damage 'by collisions, stranding, or other accidents of navigation.' There having been no collision, stranding, or other accident of navigation, there was nothing to which the only stipulation in the bill of lading against the consequences of negligence, default, or error in judgment of the master and crew, could apply."

The situation in the *Brauer* case is quite similar to that in the present case. In the *Brauer* case there was an "absence of any pressing peril to the ship" and there was also "no apparent or reasonable necessity for a jettison of the sound cattle." In short, there was negligence in the care of the cargo and no sea peril. That is the situation here. The petitioner has failed to bring the loss within any of the bill of lading exceptions.

It is submitted that the petitioner's failure to establish a sea peril would alone be sufficient to entitle respondent to a decree but respondent has gone further and shown actual negligence in the stowage of the cargo.

In 1854 this Court decided *Lawrence* v. *Minturn,* 17 Howard 100, which was approximately 43 years prior to the decision in the *Brauer* case, *supra.*

At page 7 of its brief the petitioner quotes from the *Minturn* case and asserts that the language of that case indicates

> "that there could be no recovery by the cargo owner for loss of or damage to deck cargo *no matter how caused.*" (Italics ours.)

The petitioner doubtless overlooked the following additional language of the opinion in that case which has a material bearing on the rule under discussion (p. 111):

> "There can be no doubt that a loss by a jettison, occasioned by a peril of the sea, is a loss by a peril of the sea. In that case the sea-peril is deemed the proximate cause of the loss. But if a jettison of a cargo becomes necessary in consequence of *any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract, and not to sea-peril, though that also may be present and enter into the case.* This distinction is familiar in the law of insurance. General Mut. Ins. Co. v. Sherwood, 14 How. 365, and cases there cited." (Italics ours.)

Under the above rule it is submitted that even had petitioner's vessel encountered abnormally heavy weather, respondent would prevail if there had been any negligence in stowage. Respondent herein proved negligence, which coupled with the petitioner's failure to establish a sea peril, makes the application of the rule in the above quotation from the opinion in *Lawrence* v. *Minturn, supra,* peculiarly appropriate.

While the libel in *Lawrence* v. *Minturn, supra,* was dismissed, it clearly appears in the opinion that there was no want of due negligence in the stowage of the ondeck cargo (p. 115), and that the ship was subjected to imminent grave peril (pp. 108-109).

We have shown that *Lawrence* v. *Minturn, supra,* although cited by petitioner (Brief, p. 6) as authority in support of its contention, actually supports respondent's position.

At pages 7 and 8 of its brief, petitioner quotes from *The Taibu Maru,* 1930 A. M. C. 1065, as another authority supporting its position. Here again it will be found that the decision supports respondent's contention and that the District Court was guided, in its decision, by the principle applied by this Court in the cases hereinabove cited, as appears from the following excerpts from the opinion:

> "*The claimant (carrier) has demonstrated to the required extent* that the loss was occasioned through the action of waves which came aboard the ship on February 21, 1927, the effect of which was to cause the lashings of the deck cargo to be carried away and the elements thereof to drift, * * *" (p. 1067).
>
> * * * * * *
>
> "In this case, the *proof offered by the claimant* has convinced this Court as to what took place" (p. 1067).
>
> * * * * * *
>
> "*The respondent having established the facts* as to the loss of this portion of the deck cargo, it became the burden of the libellant to show, by fair preponderance of evidence, that the loss occurred by reason of the negligence of the claimant" (p. 1069). (Italics supplied.)

Although petitioner herein failed to establish that the loss of respondent's cargo was caused by a sea peril—which state of proof, under the authorities mentioned above, entitled respondent to a decree without the necessity of submitting further evidence—respondent, nevertheless, went forward and adduced proof conclusively establishing that the loss of its cargo resulted from "faulty," "improper," "insecure" and "inadequate" stowage by respondent, as was found by the Trial Court (R., p. 208, pars. 2, 3).

At page 6 of the petition, it is asserted that under the decision of the Circuit Court of Appeals "the carrier is deprived of those rights and defenses to which he has been entitled since the inception of the maritime law of our

nation," and, on page 7, it is asserted that under this decision a carrier's "duties and liabilities have been increased measurably over such duties and liabilities as previously defined by this Court and other Courts of the United States."

We understand from the somewhat general language quoted above that petitioner's position, succinctly stated, is that the burden of showing negligence in stowage of deck cargo must be discharged by a cargo owner *prior* to a vessel owner bringing himself within a permitted exception.

We have examined petitioner's brief in vain for a single case supporting this contention. We have hereinbefore considered the only two cases cited by petitioner dealing with the issue presented, viz., *Lawrence* v. *Minturn, supra,* and *The Taibu Maru, supra,* and have shown that they, in fact, support respondent's position.

A Bill of Lading Provision Susceptible of Being Construed in the Manner Urged by Petitioner Would be Invalid as an Attempt by the Carrier, by Indirection, to Escape Liability for Its Negligence, Which Is Forbidden by the Harter Act

The Carriage of Goods by Sea Act, incorporated in a bill of lading by reference, does not apply *proprio vigore* to goods carried on deck. Section 1(c) of that Act specifically excepts such cargo from its application (46 U. S. C., Sec. 1301(c)). On the other hand, the Harter Act (46 U. S. C., 190-195) applies to on deck cargo, the only exception contained in that Act being in respect to the carriage of live cattle (Sec. 195).

The case of *United States Industrial Alcohol Co.* v. *Calmar Steamship Corp.*, 53 F. (2d) 1023 (S. D. N. Y.), was an action arising under the Harter Act and was brought to recover for the loss of cargo stowed "on deck

at shipper's risk" on a voyage in 1931. The Court held that as the carrier's evidence had failed to establish a sea peril, it was liable for the loss of libellant's on deck shipment. At page 1024, Judge KNOX said:

> "In the case now under consideration, the element of a sea peril is entirely absent. At no time was the force of the wind which preceded the loss of a part of libellant's cargo in excess of 7 on the Beaufort Scale. The resulting seas, while they were sufficient to wash the decks continuously and to cause the vessel to roll violently, were only such as reasonably were to be encountered on the voyage. Neverthelss, the stowage of libellant's cargo was broken, not only once but twice, and portions of it washed overboard. When, however, the drums that remained were relashed and given adequate support, no more trouble was experienced. This was so in face of the facts that the seas continued as heavy, and that the vessel continued to roll as violently as upon preceding days of the voyage."

Indeed, the Harter Act is the sole controlling *statute* in this case as the incorporation of the Carriage of Goods by Sea Act in the bill of lading does not give it the force of statute but merely makes its provisions additional contractual terms of the bill of lading.

Section 1 of the Harter Act (46 U. S. C., Sec. 190) makes invalid any provision in a shipping document which purports to relieve the carrier from liability for negligence in the

> "proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its * * * charge."

It is submitted that to permit the petitioner to be relieved of the burden of proof approved by this Court for many years, of showing the loss was due to an excepted cause before the cargo owner is required to prove negligence, would allow the petitioner to accomplish by indirection what the quoted section of the Harter Act has forbidden.

Calderon v. *Atlas S. S. Co.*, 170 U. S. 272, 282;
Lines et al. v. *Atlantic Transport Co.*, 223 Fed. 624, 625 (C. C. A. 2);
The Skipsea, 9 F. (2d) 887, 889 (C. C. A. 2);
The Turret Crown, 297 Fed. 766, 778, 779 (C. C. A. 2).

The burden of proof in a cargo case governed by the provisions of the Carriage of Goods by Sea Act being the same as that under the Harter Act (Knauth on Ocean Bill of Lading, 1941, pp. 144-146), the Circuit Court of Appeals, we submit, acted rightly in applying to this case the well settled rule approved by this Court in a long line of decisions, the most recent of which is *Commercial Molasses Corp.* v. *N .Y. Barge Corp., supra,* an excerpt from which is quoted at pages 8 and 9 of this brief.

The issue which the petitioner presents to this Court relates solely to burden of proof. The decision of the Court below presents no conflict with decisions of this Court or of other Circuit Courts of Appeals and involves only the application of well settled principles of law sanctioned many times by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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